IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 86 of 1999

For Approval and Signature:

HON'BLE MR.JUSTICE R.P.DHOLAKIA
and
HON'BLE MR. JUSTICE ANANT S DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

JAT JAGDISHRAM AADARAM

Appearance:
Shri N.D. Gohil, Additional Public Prosecutor
for the appellant
Shri Yogesh S. Lakhani for the respondent

CORAM : HON'BLE MR.JUSTICE R.P.DHOLAKIA
and
HON'BLE MR. JUSTICE ANANT S DAVE

Date of decision: 03/05/2005

C.A.V. JUDGEMENT

(Per : HON'BLE MR. JUSTICE ANANT S DAVE)

#. This appeal is filed b State of Gujarat Section under 378(1) (3) of the Cr.P.C. 1973 against the judgment and order of acquittal passed by the Court of learned Additional Sessions Judge, Junagadh in Sessions Case No.58/97 dtd.13.11.1998, whereby the respondent accused has been acquitted of the offences punishable under Sections 17 and 20(B) of the Narcotic Psychotropic Substance Act.

#. It is a case of the prosecution that the respondent accused was residing at the factory premises, consisted of small rooms for laborers at old Press Mill, Station Road, Manavadar and is having business of supplying laborers, since last 5 years as a Labour Contractor. That according to the information available to the complainant, on 24th January, 1997 the accused kept contraband at the factory premises of old Press Mill situated at Station Road, Manavadar and he is also indulging into selling of such contraband. On receiving the said information, the complainant alongwith members of the Raiding Party and panchas, after preparing preliminary panchnama between 11=10 a.m. to 11=15 a.m.on 24.01.1997, raided the premises of old Press Mill, Station Road, Manavadar and found 1 kg 400 gm Opium from the room, occupied by the accused and after weighing the said quantity of Opium sealed and packed in the presence of panchas and on asking whether the accused had necessary pass or permit to keep such contraband of Opium and on denial of the same by the accused, in the presence of panchas, the Opium worth of Rs.16,800/- was seized by the complainant. That as per the prosecution the said contraband was found from the small room occupied by the accused, which was lying in a small tin and one Venishankar Bhaishankar Jani, a Trader, who was present, weighed the said contraband which was of 1 kg 400 gm. That sample was brought and it was packed for chemical analysis in the presence of panchas and subsequently the accused was arrested at 12=40 p.m. for the offences punishable under Sections 17 and 20(B) of the N.D.P.S. Act. That arrest panchnama was also drawn and thereafter on 24.01.1997 about 20=25 hrs. the complaint was lodged. Thereafter, further investigation of the case was taken over by one Shri Manharlal Durgashankar Dave and he recorded the statement of Police Personnel as witnesses and also panchas and other witnesses who were connected with the said case. After obtaining report of Chemical Analyzer about the seized contraband, the charge-sheet was filed and learned Judicial Magistrate First Class, Manavadar committed said case to the Sessions Court,

Junagadh, which has jurisdiction to conduct the trial. The prosecution has examined following witnesses and documentary evidence.

Prosecution Witnesses:-

(i) Panch Witness No.1 Shantilal Kalabhai Exh.6
(ii) Panch Witness No.2 Kantilal Virjibhai Exh.8
(iii)P.W.No.3 Venishankar Bhaishankar Jani Exh.9
(iv) P.W.No.4 Kantilal Hirjibhai Exh.10
(v) P.W.No.5 Nathabhai Polabhai Exh.11
(vi) P.W.No.6 Circle P.I.Nirmalsinh Kalyansinh Gohil Exh.14
(vii) P.W.No.7 P.S.O. Allarakkha Hussein Exh.19
(viii) P.W.No.8 Jasvantsinh Karansinh Zala Exh.22
(ix) P.W.No.9 Investigating Officer Shri Manharlal Durgashankar Dave Exh.23

Documentary Evidence:-

(i) Panchnama Exh.7
(ii) Resolution of Section 42 of N.D.P.S. Act Exh.15
(iii) Original Complaint Exh.16
(iv) Letter of F.S.L. regarding analysis of the sample Exh.17
(v) Copy of the F.I.R. Exh.20
(vi) Copy of the Station Diary Exh.21
(vii) Acknowledgement Receipt from F.S.L.regarding receipt of sample Exh.24
(iix) Report of the F.S.L. Exh.26
(x) Report of the Biology Division Exh.27

#. The learned Additional Sessions Judge, Junagadh, after discussing the evidence on record, oral as well as documentery, and after considering well as documentary, and after considering the relevant provisions of N.D.P.S Act, had come to the conclusion that the prosecution has failed to prove the case against the accused for the alleged offences and there were number of discrepancies, in following mandatory provisions of Sections 42 (1) (2), 50, 52, 52(a) and 57 of the N.D.P.S Act. The learned Judge has observed that there are contradictions and discrepancies in the statements made by the witnesses, prosecution as well as other supporting witnesses. It

was further held by the learned Additional Sessions Judge that the prosecution has failed to complete the chain of circumstantial evidence and even it has failed to prove safe custody of the muddamal seized for the period from 24.01.1997 to 27.01.1997, i.e. the period when the muddamal article was given to the Police Station to the P.S.O. of Police Station and muddamal, received by the Forensic Science Lab. at Junagadh on 27.01.1997, and no satisfactory explanation is rendered and, therefore benefit of doubt is given to the accused by the learned Addl. Sessions Judge. The learned Judge has held that, in the present case, due to noncompliance of the aforementioned provisions of the Act, which are mandatory in nature, the accused is entitled for acquittal from the alleged offences punishable under Sections 17 and 20(B) of the N.D.P.S. Act. The learned Addl. Sessions Judge has also discussed the case-law so far as Sections 42, 50 and 57 of the N.D.P.S. Act are concerned and found substance in the argument advanced by the learned Counsel for the defense and having upheld the contentions, came to the conclusion that the accused was entitled for acquittal of the alleged offences.

#. Learned Addl.Public Prosecutor, Shri N.D.Gohil, appearing for the State has contended that an error of law is committed by the learned Addl. Sessions Judge in not believing the evidence of the L.C.B. Police Inspector, Shri N.K.Gohil who is the complainant and has deposed vide Exh.14 and even the report of the F.S.L. declaring the contraband as Opium which was in large quantity of 1 kg 400 gm. Besides the prosecution has also established that there was no violation of mandatory provisions of Section 42 (1) (2) of the N.D.P.S. Act and also there was no breach of Section 57 of the N.D.P.S Act. According to Shri N.D.Gohil, ld. A.P.P., an error was committed by the learned Judge in holding that prosecution has failed to prove any documentary evidence with regard to the possession of the room, where the accused was residing and there was no reason, for the learned Judge to come to the conclusion that Police Witnesses were not required to be believed in such a genuine case.

#. Shri Y.S.Lakhani appearing for the respondent and the original accused has vehemently defended the judgment dtd.13th November, 1998 delivered by the learned Addl. Sessions Judge, Junagadh in Sessions Case No.58/97 and submitted that there was no evidence which would go to show that there was strict compliance of Provisions of Section 42, 50 and 57 of the N.D.P.S. Act and when the panch witnesses were declared hostile, there was wholly

no evidence to justify the case of the prosecution that the accused had committed any offence as alleged in the complaint and the charge-sheet. Mr.Lakhani has further supported the reasoning of the learned Sessions Judge and submitted that there is no material irregularity committed by the learned Judge in appreciating the evidence of the witnesses, particularly of Shri N.K.Gohil, L.C.B. Police Inspector, P.W.No.6 at Exh.14, who has deposed that he had received the information on 23.01.1997 that the accused, who is residing at K.R.Patel Jeanning Mill, Manavadar keeps opium and deals in the said contraband and on the next day i.e.on 24.01.1997 raided the premises at Manavadar with Dy.S.P. Shri Patel, P.I.Shri Zala and other police staff. In his cross-examination, he admits that he has not disclosed in his complaint that he had received information on 23.01.1997. He further admits that he had received a specific information with regard to the name of the accused. He further admits that in his complaint he has stated that he received information that at certain Jeanning Mills at Manavadar, laborers, occupying small room and residing therein, keep, opium, a contraband in illegal manner and sells the same. He further admits that no entry is made with regard to the raid and even in Manavadar Police Station also no entry is made by the complainant. He also admits that no information was given to the PSI of Manavadar and though he completed the procedure of raiding activity, by 14=00 hrs. in the noon the complaint was registered on or about 20=10 hrs. on 24.01.1997. Thereafter he states that he has handed over muddamal to PSO, but no panchnama was drawn and no sealing procedure of muddamal had taken place at that point of time. However, he had taken receipt of the said muddamal from PSO.

#. Shri N.K.Gohil, P.W.No.6, Exh.14, further admits that he had not enquired about the possession of the room, from where the muddamal was seized and it was not seized from any person but was found below the Cot. In his further cross-examination, Shri N.K.Gohil admits that he had not seized tin box in which the muddamal was found. He has further stated that he has not mentioned about the resolution, which he has drawn at Exh.17 in his complaint.

#. It is clear from the aforementioned deposition of Shri N.K.Gohil, P.W.No.4, Exh.14 that inspite of specific information received by him, on 23.01.1997, a day prior to the raid, which was carried out on 24.01.1997 between 11=00 and 11=30 a.m., it was not reduced in writing by Shri N.K.Gohil nor even Superior Officer was informed

about the same. It is evident from his deposition that he had not informed even PSI of Manavadar Police Station about the incident in question.

#. Even discussion about the evidence of Police witnesses do not elicit any truth and even Police Head Constable Nathabhai in his cross-examination admits that no entry number or crime number was mentioned in the beginning of panchnama and panchas viz.Shri Shantilal Kalabhai Exh.6 of Raiding Party and another panch Shri Kantilal Virjibhai Exh.8 were declared hostile. Therefore, panchnama at Exh.7 is not proved by the prosecution. Even the muddamal article which was found in a tin box was also not seized and no inquiry was made about the occupier of the room and there was sizeable delay in registering the complaint by the prosecution.

#. That even evidence of Head Constable, P.W.No.5, Shri Nathabhai Polabhai at Exh.11, in his cross-examination admits that no entry was made at Junagadh Police Station about leaving the said place and he has not mentioned that they had left Junagadh at 7 O'clock on 24.01.1997 in his complaint. Even no mention is made in the Station Diary about the raid which had taken place at Manavadar, though he admits that Police Constable is supposed to make note in his weekly diary but the same was not mentioned, and there were other contradictions in his statement. So far statement of Shri Jasvantsinh Karansinh Zala, P.W.No.8 (Exh.22) is concerned, he only states that he has not performed any duties and he was only a member of the Raiding Party and his signature was not obtained in panchnama or the said panchnama was not drawn in his presence. So far as P.W.No.7 Exh.19 Shri Allarakkha Hussein is concerned, he states that he was performing his duties at Manavadar Police Station as P.S.O. on 24.01.1997 and he had recorded the complaint given by PSI Shri N.K.Gohil for the offences punishable under Sections 17 and 20B of the N.D.P.S. Act at Exh.16, which was recorded in the station diary and also F.I.R. was registered. Exh.23 is the deposition of Investigating Officer Shri Manharlal Durgashankar Dave and he has stated that Exhs.25 and 26 is the report of the F.S.L. which was found to have been Opium. He further deposes that he had taken the statement of Dy.S.P. Shri J.K.Patel, P.S.I Shri Zala, Head Constable Shri Nathabhai and other members of Raiding Party and also recorded the statement of Shri Venishankar Bhaishankar Jani, Kantibhai Hirjibhai, who have been examined as witnesses by the prosecution and mainly panch-witnesses and Shri Venishankar Bhaishankar Jani, Exh.9, trader who had weighed the contraband, were

declared hostile.

##. In view of the discussion of the aforesaid evidence and the depositions, it is revealed from the record at Exh.23 that the contraband, was seized from the accused on 24.01.1997 and received by the Forensic Science Laboratory on 27.01.1997 and the receipt at Exh.24 and forwarding letter of F.S.L. Exh.25, report of F.S.L. Exh.26 and Biological Report Exh.27, read together, it is not explained satisfactorily by the prosecution that before 27.01.1997 whether said muddamal remained in the safe custody for 3 clear days and this is a missing link so far as the prosecution is concerned which is not connected with the crime of the accused. The learned Judge has therefore, after applying case-law on this issue, as laid down in (State of Panjab Vs.Balbri Singh, AIR 1994 SC, 1872, by the Apex Court that the noncompliance of the mandatory provisions of Section 42 renders the case of the prosecution vulnerable and in view of the fact that the present case also there was noncompliance of the mandatory provisions of Section 42, has rightly acquitted the accused of the offences under the N.D.P.S. Act.

##. Therefore, as discussed in the foregoing parapraphs about the non-compliance of the mandatory provisions of Section 42 of the NDPS Act, and as per the law laid down by the Apex Court in State of Pujab vs. Balbir Singh, AIR 1994 SC 1872, State of Punjab vs. Baldev Singh, AIR 1999 SC 2378, Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat, AIR 2000 SC 821, and State of West Bengal Vs. Babu Chakraborty, AIR 2004 Supreme Court 4324, we have no doubt in our mind that in the facts of the present case there was no compliance with the mandatory provisions of Section 42 of the NDPS Act, 1985 and, therefore, no infirmity is noticed in the judgment of the learned Additional Sessions Judge, Junagadh, and, hence, the appeal deserves to be rejected. None of the contentions raised by Shri N.D.Gohil, learned Additional Public Prosecutor, stands to the scrutiny of facts or evidence on record.

##. Taking into consideration over all totality of appreciation of the evidence- oral as well as documentary - by the learned Additional Sessions Judge and failure to comply with the mandatory provisions of Sections 42, 50 and 57 in our view, no case is made out by the prosecution in the present appeal which may require this Court to upset the findings of fact correctly arrived at by the learned Additional Sessions Judge by applying the case law of the Apex Court on the subject. We do not find any reason to reverse or upset the judgment dated

13th November 1998 passed by the learned Additional Sessions Judge in Sessions Case No.58 of 1997.

In the result, the appeal is dismissed.

(R.P.Dholakia)
Judge

(Anant S. Dave)
Judge

(swamy)